

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION**

ED BUTOWSKY,

§
§
§
§
§
§
§
§
§
§
§
§
§
§
§
§
§

Plaintiff,

v.

CIVIL ACTION NO.

DAVID FOLKENFLIK, ET. AL.,

4:18-CV-00442-ALM

Defendants.

§
§
§
§
§
§
§
§
§

THIRD JOINT MOTION TO MODIFY SCHEDULING ORDER

COME NOW Plaintiff Ed Butowsky (“Plaintiff”) and Defendants National Public Radio, Inc., David Folkenflik, Edith Chapin, Leslie Cook, and Pallavi Gogoi (collectively “Defendants”), and file this Joint Motion to Modify Scheduling Order, as follows:

1. On February 11, 2020, this Court entered a Second Amended Scheduling Order (Dkt. 92), which established various deadlines up to and including a Final Pretrial Conference on April 1, 2021. Plaintiff filed its Second Amended Complaint on September 30, 2019 (Dkt. 72).

2. Since that time, the parties have continued to engage in substantial discovery. In particular, the parties have exchanged multiple written discovery requests, and both parties have produced documents in response to the other party’s requests for production. The parties have also engaged in substantial third-party discovery, with Defendants having issued more than forty subpoenas to various third parties.

3. The parties’ efforts to engage in discovery have been delayed by Mr. Butowsky’s medical condition. In his most recent Declaration (Dkt. 140-1), Mr. Butowsky discussed being

incapacitated, stated that he has had ten surgeries and 33 other medical procedures since 2017 and that he is currently awaiting another surgery to insert another artificial hip. (Dkt. 140-1). *See also* Butowsky Declaration in *Aaron Rich v. Butowsky*, Case No. 1:18-cv-00681-RJL (Dkt. 109-9) (stating that Plaintiff has spent 71 days in the hospital and has undergone six major surgeries); Butowsky Declaration in *Aaron Rich v. Butowsky*, Case No. 1:18-cv-00681-RJL (Dkt. 167-1) (stating Plaintiff has had extreme pain and/or under the influence of pain medications which have affected his ability to concentrate on legal documents and strategic matters); Butowsky Declaration in *Aaron Rich v. Butowsky*, Case No. 1:18-cv-00681-RJL (Dkt. 97-9) (identical to 109-9 referenced above).

4. The parties' efforts to engage in discovery have also been delayed by the current health crisis. On March 13, 2020, President Trump issued a proclamation Declaring National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak. The Eastern District of Texas has entered General Orders 20-03 and 20-09 addressing Court Operations Under Exigent Circumstances Created by the COVID-19 pandemic. Due to the public health crisis and the national emergency and the various stay-at-home orders issued on a local basis, in-person service of subpoenas for documents and depositions have been hampered due to the public health crisis.

5. There are several motions pending before this Court, including:

- a. Defendants' Motion to Compel Discovery Pursuant to Fed. R. Civ. P. 37 filed on January 13, 2020 (Dkt.85);
- b. Defendants' Motion for Sanctions Pursuant to Rule 11 for Violations Committed by Plaintiff and His Counsel filed on February 18, 2020 (Dkt. 96);
- c. Plaintiff's Motion for Leave to File Third Amended Complaint filed on February 18, 2020 (Dkt. 98);

- d. Motion to Compel Chapwood filed on March 16, 2020 in Case No. 4:20-mc-36¹; and
- e. Motion to Compel Kim Sams filed on March 27, 2020 in Case No. 4:20-mc-38.

6. In light of Plaintiff's poor health, the current national health crisis, the pendency of several motions to compel discovery from Plaintiff and relevant non-parties, and the number of third parties from whom discovery must be obtained and the number witnesses who must be deposed, the parties have mutually agreed that additional time is necessary for completion of discovery, the deadline to file dispositive motions, and trial. The parties' agreement to amend the schedule is a reflection of certain unforeseen developments in this case and in this country and a realistic, early assessment of their impact on the existing schedule. Accordingly, the parties jointly request that the unexpired portions of the February 11, 2020 Scheduling Order (Dkt. 92) be modified, as set forth below.

7. The parties jointly request that the following deadlines set forth in the current Scheduling Order be modified as follows:

- A. Deadline for completion of discovery: May 31, 2021.
- B. Deadline to file Motions to Dismiss, Motions for Summary Judgment, or other dispositive motions: July 16, 2021.
- C. Date by which the parties shall notify the Court of the agreed-upon mediator, or alternatively request that the Court select a mediator: August 27, 2021.
- D. Deadline to (i) provide notice of intent to offer certified records (ii) confer concerning preparation of Pretrial Order and Proposed Jury Instructions

¹ Both the Motion to Compel Sams and Chapwood were originally filed in the Northern District of Texas on January 16, 2020 and January 24, 2020, respectively, and were subsequently transferred to the Eastern District of Texas.

and Verdict Form and (iii) submit video deposition designations:
September 20, 2021.

- E. Deadline to (i) complete mediation (ii) file Motions in Limine and (iii) file Joint Final Pretrial Order: October 4, 2021.
- F. Deadline to (i) file Responses to Motions in Limine (ii) file objections to witnesses, deposition extracts, and exhibits listed in the Pretrial Order and (iii) file Proposed Jury Instructions and Verdict Form: October 25, 2021.
- G. Final Pretrial Conference: November 11, 2021, or as near to that date as is possible given the Court's calendar.

8. Except as set forth in this Agreed Motion, all other deadlines set forth in the Court's February 11, 2020 Second Amended Scheduling Order (Dkt. 92) shall remain unchanged.

WHEREFORE, Plaintiff and all Defendants request that the Scheduling Order be modified as requested herein.

Respectfully submitted,

By: /s/ Ty Clevenger
Ty Odell Clevenger
Texas Bar No. 24034380
P.O. Box 20753
Brooklyn, NY 11202-0753
Telephone: 979-985-5289
Facsimile: 979-530-9523
Email: tyclevenger@yahoo.com

Steven S. Biss (VSB # 32972)
300 West Main Street, Suite 102
Charlottesville, VA 22903
Telephone: 804-501-8272
Facsimile: 202-318-4098 (fax)
Email: stevenbiss@earthlink.net

Attorneys for Plaintiff

By: /s/ Laura Lee Prather

Laura Lee Prather
State Bar No. 16234200
laura.prather@haynesboone.com
Wesley D. Lewis
State Bar No. 24106204
wesley.lewis@haynesboone.com
HAYNES AND BOONE, LLP
600 Congress Avenue, Suite 1300
Austin, Texas 78701
Telephone: (512) 867-8400
Facsimile: (512) 867-8470

David H. Harper
State Bar No. 09025540
david.harper@haynesboone.com
2323 Victory Avenue, Suite 700
Dallas, Texas 75219
Telephone: (214) 651-5000
Telecopier: (214) 651-5940

David J. Bodney
admitted pro hac vice
bodneyd@ballardspahr.com
Ian O. Bucon
admitted pro hac vice
bucconi@ballardspahr.com
BALLARD SPAHR LLP
1 E. Washington Street, Suite 2300
Phoenix, Arizona 85004-2555
Telephone: 602.798.5400
Facsimile: 602.798.5595

Attorneys for Defendants